

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

HYPERPHRASE TECHNOLOGIES,
LLC and HYPERPHRASE, INC.

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

MEMORANDUM AND ORDER
06-C-199-S

Plaintiffs Hyperphrase Technologies, LLC and Hyperphrase, Inc. commenced this patent infringement action alleging that Defendant Google Inc.'s AutoLink and AdSense products infringed plaintiffs' United States Patents Nos. 5,903,889, 6,434,567, 6,526,321 and 7,013,298. On December 20, 2006 this Court granted summary judgment of non-infringement to defendant on all of plaintiffs' claims. The matter is presently before the Court on defendant's motion to find the case exceptional and award attorney's fees.

MEMORANDUM

Section 285 provides that a "court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285. Recovery of fees under § 285 involves a two pronged inquiry that requires a factual finding that the case is exceptional and a discretionary decision to award fees. Motorola, Inc. v. Interdigital Technology Corp., 121 F.3d 1461, 1468 (Fed. Cir.

1997). Whether a case is exceptional is a factual question defendant must prove by clear and convincing evidence. See Interspiro USA, Inc. v. Figgie Intern., Inc., 18 F.3d 927, 933 (Fed. Cir. 1994). Among the grounds appropriate for finding a case exceptional are litigation misconduct and vexations, unjustified, and otherwise bad faith litigation. Epcon Gas Systems, Inc. v. Bauer Compressors, Inc., 279 F.3d 1022, 1034 (Fed. Cir. 2002). Filing and maintaining an infringement suit in subjective bad faith, which is also objectively baseless constitutes grounds for declaring a case exceptional. Brooks Furniture Mfg., Inc. v. Dutailier Intern., Inc., 393 F.3d 1378, 1381 (Fed. Cir. 2005).

Defendant contends that this action was brought in bad faith and was objectively baseless, warranting the award of fees. The evidence of either subjective bad faith or objective baselessness does not meet the clear and convincing standard and does not warrant an award of fees. Although the Court ultimately rejected plaintiffs' overly broad claim interpretation, adopting a more narrow interpretation which could not sustain a finding of infringement, the case was not exceptional.

There is virtually no evidence that this case was brought in bad faith. Defendants' support for its motion on this point consists almost exclusively of hindsight reliance on the summary judgment decision in its favor. An objective view of the entire file and the conduct of this litigation suggests to the contrary

that plaintiff commenced the action in good faith believing that it could prevail on the broad claim construction it advanced. To award fees in this instance would be to convert § 285 into a routine fee shifting statute.

This matter was not exceptional and defendant's request for fees is denied.

ORDER

IT IS ORDERED that defendant's motion to find the case exceptional and award fees pursuant to 35 U.S.C. § 285 is DENIED.

Entered this 14th day of February, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge